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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ASWAD AMIRAH WALKER,

Defendant and Appellant.

D073680

(Super. Ct. No. SCD262972 )

APPEAL from a judgment of the Superior Court of San Diego County, Eugenia A. Eyherabide, Judge. Affirmed as modified.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Seth M. Friedman and Michael Pulos, Deputy Attorneys General for Plaintiff and Respondent.

In 2018, a jury convicted Aswad "Ozzie" Amirah Walker of second degree murder in connection with the 1995 shooting of Crystal Odom. (Pen. Code, § 187, subd. (a).)<sup>1</sup> The jury found true the allegation that Walker committed the offense for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1).) The trial court sentenced Walker to prison for an indeterminate term of 15 years to life, plus a consecutive three-year term for the gang enhancement. The trial court also imposed a parole revocation restitution fine under section 1202.45.

On appeal, Walker contends, and the Attorney General concedes, the consecutive three-year term imposed under section 186.22, subdivision (b)(1) and the parole revocation restitution fine imposed under section 1202.45 are unauthorized. We agree and direct the judgment to be modified accordingly. As modified, the judgment is affirmed.

## BACKGROUND

In 2016, the district attorney filed a second amended information that charged Walker with the April 29, 1995 murder of Crystal (Pen. Code, § 187, subd. (a) (count 1)) and the attempted murder of Curtis H. (§§ 664, 187, subd. (a) (count 2)). The information alleged that Walker personally used a firearm (§ 12022.5, subd. (a)) and committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)).

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<sup>1</sup> All statutory references are to the Penal Code.

### *A. Trial Evidence*

On the night of April 29, 1995, Crystal drove to a gas station a few blocks from her mother's house in Encanto.<sup>2</sup> Curtis was sitting in the front passenger seat, and their 10-month-old daughter was in the back seat. At the gas station, Curtis noticed a car full of people looking at him. He recognized Walker sitting in the front passenger seat of the car. Curtis knew Walker; they had attended middle school together and had previously fought. Curtis knew Walker associated with Bloods, a street gang that dominates the area and identifies with the color red. Curtis hung around Crips, a street gang that associates with the color blue. Curtis testified that someone in the back seat of the car Walker was in was wearing red. Curtis testified Crystal also noticed the car full of people staring at them. Worried that something might happen if Curtis got out of the car to get gas, they decided to leave.

J.P. testified he was with Walker, whom he called Ozzie, and Samuel Sayles that night.<sup>3</sup> They were in Sayles's car, a Saab. Sayles was driving, Walker was in the front passenger seat, and J.P. was seated directly behind Walker in the rear-side passenger

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<sup>2</sup> We provide an abbreviated summary of the facts because they are not relevant to the issues on appeal.

<sup>3</sup> J.P. was originally charged as a codefendant with Walker and Sayles in superior court; however, because he was a minor at the time of the offense, he was transferred to juvenile court, where he admitted to a charge of accessory after the fact in connection with the offense. Sayles was convicted in a prior trial, in which he and Walker were tried together with separate juries. In that trial, a mistrial was declared as to Walker when his jury was determined to be deadlocked.

seat.<sup>4</sup> J.P. associated with the Skyline street gang, a Blood set that was rivals with the Crips. J.P. testified that Curtis's car caught the group's attention when it pulled in. When Curtis's car left the gas station, J.P., Sayles, and Walker followed it.

Curtis testified the Saab was following them closely and flashing its headlights on and off. Crystal sped up, trying to get away, but Curtis told her to slow down because the baby was in the back seat. As Crystal slowed at an intersection to turn right, the Saab pulled around them to the left and fired three shots into Curtis's car before speeding off. Curtis saw the muzzle flash from a gun in the front passenger seat.<sup>5</sup> J.P. testified that shots rang out from the front seat, where Walker was seated. J.P. believed the shots were fired as a scare tactic.

Curtis testified that Crystal slumped over towards him; blood squirted from her neck. He grabbed the steering wheel, moved Crystal's leg off the gas pedal, and maneuvered the car to the side of the road, up a hill, to stop it. He got into the driver's seat and drove to Crystal's mother's house, which was a few blocks away, to call an ambulance. He carried Crystal's body inside; she did not survive.

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<sup>4</sup> J.P. testified that there may have been additional passengers in the car, including a female, but he could not recall specifically. He knew C.C., another witness who testified at trial, was not with them that night.

<sup>5</sup> Curtis acknowledged that he had previously made inconsistent statements regarding whether Walker was sitting in the front or rear-side passenger seat. He testified that he believed Walker was sitting in the front passenger seat and that his previous confusion was caused by a friend's experience, several years after Crystal's death, in which the friend's vehicle was targeted by a drive-by shooter seated in the back seat who killed the friend's daughter.

An autopsy revealed three gunshot wounds, one to the head and two to the neck. The medical examiner determined Crystal died of gunshot wounds to the head and neck and classified the manner of death as a homicide. A bullet recovered near her body and two casings found on the street were determined to have been fired from a handgun recovered during a traffic stop of a vehicle driven by C.C., a suspected member of the East Side Piru or Skyline street gang. C.C. told officers he had purchased the gun from Ozzie in August of 1995; at that time, Ozzie told him the gun had been used in a shooting in Encanto.

The day before Crystal was shot, a detective with the San Diego Police Department responded to a request for assistance from a high school reporting a disturbance at the school caused by a gray Saab. The detective stopped a Saab driven by Sayles. In a report memorializing the stop, the detective reported that Sayles was driving, Walker was in the front passenger seat, and J.P. was in the back seat. At the time of the stop, Sayles, Walker, and J.P. each claimed they were Skyline Piru gang members.

Detective Hutchinson, a detective in the gang unit of the San Diego Police Department during 1995, testified as a gang expert in the case. Detective Hutchinson testified that the location where Crystal was shot, in the Encanto neighborhood, was known to be the territory of the Skyline street gang. The Skyline street gang, also known as East Side Piru, was a Blood set primarily involved in drug sales, robberies, homicides, drive-by shootings, and other criminal activities. Detective Hutchinson opined that, if a group of Skyline Pirus encountered an individual perceived to be a member of a Crip gang, it could provoke a violent encounter. The confrontation would be a crime

committed for the benefit of a criminal street gang, benefitting the gang by building its status and preventing it from being perceived as weak.

*B. Conviction and Sentencing*

On February 7, 2018, the jury found Walker guilty of second degree murder and found true the allegation that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1). The jury found not true the allegation that Walker personally used a firearm in the commission of the offense (§ 12022.5, subd. (a)) and found Walker not guilty of attempted murder.

The trial court sentenced Walker to an indeterminate term of 15 years to life for second degree murder (§ 190, subd. (a)) and imposed an additional, consecutive term of three years under section 186.22, subdivision (b)(1), for a total term of 15 years to life plus three years. The trial court also imposed various fines and fees, including a restitution fine of \$4,500 imposed under section 1202.4, subdivision (b), and a parole revocation restitution fine of \$4,500 imposed and stayed under section 1202.45.

On appeal, Walker challenges the consecutive three-year term imposed under section 186.22 as well as the parole revocation restitution fine imposed under section 1202.45. He contends, and the Attorney General concedes, both the three-year term and the parole revocation restitution fine are unauthorized and should be stricken. We agree and direct the judgment to be modified accordingly.

## DISCUSSION

### A. *Three-year Consecutive Term Under Section 186.22, Subdivision (b)(1)*

Walker contends the trial court erred when it imposed an additional term of three years under section 186.22, subdivision (b)(1). Instead, the 15-year parole eligibility minimum should have been imposed under subdivision (b)(2) (since renumbered to (b)(5)).

In 1995, when the crime occurred, section 186.22 provided, in relevant part:

"(b)(1) *Except as provided in paragraph (2)*, any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of one, two, or three years at the court's discretion. . . .

(2) Any person who violates this subdivision in the commission of a felony punishable by *imprisonment in the state prison for life*, shall not be paroled until a minimum of 15 calendar years have been served." (Italics added.)

In *People v. Lopez* (2005) 34 Cal.4th 1002, 1004, our Supreme Court held that when a person is convicted of a felony "punishable by imprisonment in the state prison for life," section 186.22, subdivision (b)(1) does not apply to impose a determinate term for the enhancement. Rather, subdivision (b)(5)—subdivision (b)(2) at the time of Walker's crime—applies to impose a minimum term of 15 years before the defendant can be considered for parole. (*Lopez*, at pp. 1005-1011; see *People v. Ortiz* (1997) 57 Cal.App.4th 480, 485-486 [for a defendant convicted of a felony punishable by

imprisonment in state prison for life, the "section 186.22 enhancement is not an additional determinate term, but an extended parole eligibility date"].) *Lopez* emphasized that the 15-year minimum parole eligibility provision in subdivision (b)(5) applies to all life terms, including terms of years to life, and not merely " 'straight' " life terms. (*Lopez*, at p. 1007.) Because Walker received a 15-year-to-life sentence for second degree murder, his sentence must be modified to strike the consecutive three-year term imposed under section 186.22, subdivision (b)(1) and to indicate instead a sentence of 15 years to life with a 15-year minimum parole eligibility date. (*See Lopez*, at p. 1011.)

*B. Unauthorized Parole Revocation Restitution Fine*

The trial court imposed a \$4,500 restitution fine under section 1202.4 and imposed and stayed an additional \$4,500 parole revocation restitution fine under section 1202.45. Walker argues the parole revocation restitution fine is unauthorized and must be stricken.

Section 1202.4, which was enacted more than a decade before section 1202.45, mandates imposition of a restitution fine when a person is convicted of a crime, unless the court finds compelling and extraordinary reasons for not doing so and states those reasons on the record. (§ 1202.4, subd. (b).) Section 1202.45 requires imposition of an additional parole revocation restitution fine in the same amount as the section 1202.4 restitution fine if the sentence includes a period of parole. (§ 1202.45, subd. (a).)

Section 1202.45 was enacted in 1995 and did not become effective until August 1995, several months after the crime occurred in April 1995. (Stats. 1995, ch. 313, § 6 (Assem. Bill 817), eff. Aug. 3, 1995.) Walker argues, and the Attorney General concedes, imposing the parole revocation fine violates ex post facto principles.



We agree. (See *People v. Callejas* (2000) 85 Cal.App.4th 667, 676 ["the ex post facto clause forbids imposing a parole revocation fine on a parolee who committed the underlying crime prior to enactment of the fine"]; U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) We therefore strike the \$4,500 parole revocation restitution fine imposed under section 1202.45.

#### DISPOSITION

The judgment is modified to strike the three-year consecutive term imposed under section 186.22, subdivision (b)(1) and to indicate instead a sentence of 15 years to life with a 15-year minimum parole eligibility date. The judgment is further modified to strike the \$4,500 parole revocation fine imposed under section 1202.45. As modified, the judgment is affirmed.

The trial court is directed to prepare an amended abstract of judgment that accurately reflects the defendant's sentence as modified and to forward a copy of that amended abstract to the Department of Corrections and Rehabilitation.

GUERRERO, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.